



INDIANA COURT OF APPEALS ORAL ARGUMENT AT A GLANCE HAMMOND

EQUITABLE RELIEF

The Thorns sued the Lake County zoning authorities for refusing to issue further building permits for the subdivision the Thorns are developing. Did the Thorns prove the elements required for the trial court to issue a permanent injunction requiring the zoning authorities to issue building permits for the subdivision?

PRE-TRIAL DISCOVERY

The Thorns served Requests for Admissions on the Lake County defendants and the defendants did not respond in a timely manner, thereby admitting the requests by operation of a trial rule. Should the trial court have granted the Lake County zoning authorities' motion to withdraw and amend its admissions?

***Lake
County
Board of
Zoning
Appeals et
al. v. James
C. Thorn
and Pamela
Thorn, et al.***

Appeal from:
Lake Circuit
Court

The Honorable
Lorenzo
Arredondo,
Judge

**Oral
Argument:**
April 19, 2007
1:00 – 1:40 p.m.
CT
20 minutes
each side

CASE SYNOPSIS

Facts and Procedural History

James and Pamela Thorn own property in Lowell, Indiana, an unincorporated part of Lake County. In March 1996, they began the process of developing a subdivision on that land to be called "Thornmeadow." They intended to subdivide the land into thirty-five single-family residential lots, to be completed in three phases. In July 1996, the Lake County Plan Commission gave primary approval to the plans for the entire subdivision, and in November 1996, gave secondary approval to plans for Phase I of the subdivision. The Thorns posted appropriate **performance bonds** for Phase I. In October 1999, the Lake County Board of Commissioners gave final approval to Phase I and released the accompanying performance bonds.

In August 1998, the Plan Commission gave secondary approval to plans for Phase II of the subdivision. A performance bond was posted for Phase II. The Lake County Subdivision Ordinance requires performance bonds to specify that all improvements will be installed within two years, subject to a one-year extension that may be granted by the Plan Commission. The plans for Phase II called for a dry-bottom drainage pond to be installed. In completing the improvements to Phase II, however, the Thorns installed a wet-bottom drainage pond instead of the dry-bottom pond indicated by the approved plans. Because of this, final approval was not given to Phase II within two years and the Thorns did not request the one-year extension. The Subdivision Ordinance also provides that no building permits will be issued in a subdivision with delinquent bonds. Therefore, in August 2002, the Thorns received a letter from Ned Kovachevich, Assistant Director of the Plan Commission, stating that no further building and zoning permits for any lots

*Lake County Board of Zoning Appeals et al. v. James C. Thorn and Pamela Thorn, et al.***Case Synopsis (continued)**

In the subdivision would be issued.

The Thorns appealed that decision to the Lake County Board of Zoning Appeals, which held a hearing and denied the Thorns' appeal. The Thorns then filed a lawsuit in Lake County Circuit Court regarding the refusal to issue permits for Phase I of the subdivision, and subsequently sought an injunction against the various county zoning authorities. After a hearing, the trial court granted a **permanent injunction**, ordering the appropriate county authorities to issue building permits to the owners of each lot in Phase I who applied for one. Lake County now appeals the issuance of that injunction.

In addition, while this case was pending, the Thorns served **Requests for Admissions** on the Surveyor's Office, the Plan Commission, and Kovachevich. When more than thirty days passed with no response, the Thorns requested the trial court issue an order deeming the requests admitted and Lake County moved to withdraw and amend its admissions. The trial court denied the motion to withdraw. Lake County also appeals this determination.

Parties' Arguments

I. Injunction

A permanent injunction may be granted if the party requesting the injunction proves four elements: 1) that his remedies at law are inadequate; 2) that he has succeeded on the merits of his underlying claim; 3) that the injury he will sustain if the injunction is not

granted is greater than the injury the other party will sustain if it is granted; and 4) that the public interest will not be disserved if the injunction is granted. The trial court in this case found that the Thorns proved each of these four elements and were entitled to a **mandatory injunction** directing Lake County to issue building permits.

Please see page 4 for a Glossary of Terms.

On appeal, Lake County contends that the Thorns have not proved two of those four elements. First, Lake County asserts that the Thorns have not proved their remedies at law are inadequate, and second, it asserts that the Thorns have not succeeded on the merits of their underlying claim.

With respect to the remedy at law, the party requesting an injunction must prove that the legal remedy – in most cases, money damages – cannot make him whole and only an equitable remedy can prevent certain and irreparable harm. Where damage is ascertainable in economic terms, the legal remedy is sufficient and an injunction should not be issued. Lake County contends that the damages the Thorns assert – loss of business, possible default on a bank loan, and threatened lawsuits by lot owners who cannot get building permits in the subdivision – can all be calculated and remedied by money damages. Lake County also contends that the Thorns did not prove their damages at the hearing by competent evidence, relying instead on unsupported statements by their counsel.

Case Synopsis (continued)

The Thorns counter that because of “changing economic conditions, market conditions, interest rates, and the speculative nature of real estate,” their damages cannot be calculated in any meaningful way. Further, they assert that their situation fits an exception to the requirement to prove an inadequate remedy at law: where the action sought to be enjoined is unlawful, the party seeking the injunction does not have to prove irreparable harm. The Thorns contend that because their performance bond is not delinquent (which Lake County disputes), there is no lawful basis on which Lake County can deny building permits for Thornmeadow. The Thorns also contend that even if their performance bond is delinquent, it is securing only Phase II improvements, and therefore there is no lawful basis on which to deny permits in Phase I when Phase I has received final approval and been recorded.

With respect to success on the merits, Lake County contends that the Thorns performance bond is delinquent and that the subdivision ordinance therefore requires no further building permits be issued for the entire subdivision. The Thorns again assert that their bond is not delinquent and that at most, the subdivision ordinance precludes issuing building permits in the phase with the delinquent bond. Essentially, the parties disagree over the interpretation of the terms of the performance bond and the relevant portions of the subdivision ordinance.

contends that the trial court’s order directing Lake County to take certain action with respect to the Thorns’ subdivision improperly violates the separation of powers doctrine and oversteps its jurisdictional bounds. Lake County asserts that the Plan Commission is a legislative entity with sole authority and discretion in making subdivision decisions, and the trial court improperly substituted its judicial discretion for the Plan Commission’s legislative discretion. The Thorns respond that even if the Plan Commission is a legislative entity for subdivision decisions, issuing a building permit is purely a ministerial function, not a discretionary one, once the statutory requirements for issuance are met. The Thorns also note that they are pursuing judicial relief as mandated by statute following denial of an appeal by the Board of Zoning Appeals, so the trial court has jurisdiction over this matter.

II. Motion to Withdraw

Trial Rule 36 provides that a party may serve on any other party a written request to admit the truth of certain matters at issue. The matter is deemed admitted and conclusively established for purposes of the litigation unless the party of whom the request was made makes a written response or objection within thirty days. However, the trial court may, on motion by the party of whom the requests were made, allow withdrawal or amendment of previously-made admissions. The court can only grant such relief if the party seek-

Opinion in this case expected:

By summer 2007

The Court will notify Kris Sake-laris when the opinion is handed down. Please check the Court’s website to read the opinion.

Court of Appeals opinions are available online at <http://www.in.gov/judiciary/opinions/appeals.html>.

Locate archived opinions at <http://www.in.gov/judiciary/opinions/archapp.html>

Case Synopsis (continued)

ing withdrawal proves that such action would subserve the presentation of the case's merits, and the party seeking admission fails to prove that such action would prejudice him in maintaining his action on the merits. However, even if those two conditions are met, the trial court may still deny the motion to withdraw.

Lake County asserts that its failure to make a timely response to the Thorns' requests for admission was inadvertent, and that withdrawal would subserve the presentation of the case's merits because the matters sought to be

admitted relate to the core issues in the case and effectively prove the Thorns' case. Lake County also asserts that the Thorns have not demonstrated any prejudice if withdrawal is allowed. The Thorns respond that the trial court has absolute discretion in granting or denying a motion to withdraw, that Lake County has not proven its failure to respond was the result of an honest mistake, and that it will be prejudiced because it will be required to conduct extensive and expensive discovery to prove the same facts already established by the admissions.

GLOSSARY

A **permanent injunction** is issued upon final determination of the merits of a party's claim. It is different from a **preliminary injunction**, which is issued while an action is pending. The elements for granting either type of injunction are the same, except that the proponent of the injunction must prove a reasonable likelihood of success on the merits of its claim in order to receive a preliminary injunction, and must actually succeed on the merits of its claim in order to receive a permanent injunction.

Requests for Admission are a discovery device, like interrogatories and depositions, used to help the parties during the pre-trial period develop, simplify, and otherwise formulate issues for trial.

A **performance bond**, in this context, insures the county against default by the landowner. That is, if the landowner failed to make the improvements insured by the performance bond, the amount of the performance bond would be paid to the county so the county could finish the improvements.

A **mandatory injunction** orders a party to take certain action; as opposed to a **prohibitory injunction**, which orders a party to refrain from taking certain action.

For more information, please visit the Indiana Court of Appeals website at
<http://www.in.gov/judiciary/appeals/>

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TODAY'S PANEL OF JUDGES

Hon. Patricia A. Riley (Jasper County), Presiding

- Judge of the Court of Appeals since January 1994

Patricia A. Riley, currently the presiding judge for the Court of Appeals' Fourth District, was named to the Indiana Court of Appeals by Governor Evan Bayh in January of 1994.

A native of Rensselaer, Judge Riley earned her bachelor's degree from Indiana University-Bloomington in 1971 and her law degree from the Indiana University School of Law-Indianapolis in 1974.

Early in her career she served as a Deputy Prosecutor in Marion County and a public defender in Marion and Jasper counties before entering into private practice in Jasper County. She served as a judge of the Jasper Superior Court from 1990 to 1993.

Judge Riley is a former associate professor at St. Joseph's College in Rensselaer and is currently an adjunct professor of law at the Indiana University School of Law—Indianapolis.

Judge Riley's legal memberships include the Indianapolis Bar Association, the Marion County Bar Association, and the Indiana State Bar Association, including co-chair of the ISBA's Racial Diversity in the Profession Section; member, Women in the Law Committee; and member, Committee on Improvements in the Judicial System.

Judge Riley is the former chair of the Appellant Practice Section of the American Bar Association, and a member of the ABA's Judicial Division International Courts Committee. She is a member of the Indiana Judges Association and the Board of Directors of the National Association of Women Judges.

Judge Riley is the mother of two sons. She was retained on the Court by election in 1996 and 2006.

The Court of Appeals hears oral argument at venues across the state to enable Hoosiers to learn about the judicial branch.

This initiative began statewide just prior to the Court's centennial in 2001.

Today's oral argument is the 185th case the Court of Appeals has heard "on the road" since early 2000.

Among the sites for traveling oral arguments are law schools, colleges, high schools, and county courthouses.

TODAY'S PANEL OF JUDGES

Hon. Melissa S. May (Vanderburgh County)

- Judge of the Court of Appeals since April 1998

Melissa S. May was appointed to the Court of Appeals in April of 1998. Judge May was born in Elkhart, Indiana. She graduated from Indiana University-South Bend with a B.S. in 1980 and from Indiana University School of Law-Indianapolis with a J.D. in 1984.

Between law school and her appointment to the Court, Judge May practiced law in Evansville, Indiana, focusing on insurance defense and personal injury litigation.

Judge May has been active in local, state, and national bar associations and bar foundations. She served the Indiana Bar Association on the Board of Managers from 1992-1994, as Chair of the Litigation Section from 1998-1999, as Counsel to the President from 2000-2001, and as co-chair of the Futures Taskforce. In addition, she was a member of the Board of Directors of the Indiana Continuing Legal Education Forum from 1994-1999 and has been the co-chair of ICLEF's Indiana Trial Advocacy College from 2001 to 2005. She is a fellow of the

Indiana Bar Foundation, as well as for the American Bar Association, and she is a Master Fellow of the Indianapolis Bar Association.

From 1999 till December 2004, Judge May was a member of Indiana's Continuing Legal Education Commission, where she chaired the Specialization Committee. She is currently on an Advisory Panel to the Specialization Committee. In 2005, she was named to the Indiana Pro Bono Commission. In 2003, Judge May was named to the American Bar Association's Standing Committee on Attorney Specialization. She is now special counsel to that committee.

In the spring of 2004, Judge May became adjunct faculty at Indiana University School of Law-Indianapolis, where she teaches a trial advocacy course. Also in the spring of 2004, she was awarded an Honorary Doctor of Civil Law from the University of Southern Indiana.

Judge May was retained on the Court of Appeals by election in 2000.

The 15 members of the Indiana Court of Appeals issue some 2,500 written opinions each year.

The Court of Appeals hears cases only in three-judge panels. Panels rotate three times per year. Cases are randomly assigned.

TODAY'S PANEL OF JUDGES

Hon. Margret G. Robb (Tippecanoe County)

- Judge of the Court of Appeals since July 1998

Margret G. Robb was appointed to the Indiana Court of Appeals in July 1998 by Gov. Frank O'Bannon. She holds a B.S. and M.S. in Business Economics from Purdue, and is a 1978 Magna Cum Laude graduate of Indiana University School of Law - Indianapolis. Prior to joining the Court she was engaged in the general practice of law for 20 years in Lafayette and was a Chapter 11, 12 and a Standing Chapter 7 Bankruptcy trustee for the Northern District of Indiana; and the Federal Advisory Committee for the expediting of Federal Litigation. She was a registered family and civil law mediator and served as a Tippecanoe County Deputy Public Defender.

Judge Robb chairs the Supreme Court Task Forces on Family Courts, the development of Trial Court Local Rules, and is involved in several projects to benefit the Indiana legal system. She has also served as a member of the Indiana Board of Law Examiners, the Governance Committee of the Supreme Court IOLTA (Interest On Lawyers' Trust Accounts) Committee; the Federal Advisory Committee on Local Rules for the Federal Court for the Northern District of Indiana; and Federal Advisory Committee for the expediting of Federal Litigation.

Judge Robb has held numerous Board positions for and been an officer for the Indiana State Bar

Association, Indiana Bar Foundation, Tippecanoe County Bar Association, Indianapolis Bar Association, Indianapolis Bar Foundation, American Bar Foundation, National Association of Women Judges, Indiana University School of Law at Indianapolis Alumni Association, and speaks frequently on legal topics for attorneys and other judges.

Judge Robb was Founding Chair of the Governor Otis Bowen's Commission on the Status of Women; was a recipient of the 1993 Indiana State Bar Association's "Celebrating 100 Years of Women in the Legal Profession" award; the 2001 Maynard K. Hine distinguished alumni award, given in recognition of support and service to IUPUI and Indiana University; the 2004 Bernadette Perham "Indiana Women of Achievement" Award, bestowed by Ball State University in honor of one of their outstanding Award, bestowed by Ball State University in honor of one of their outstanding professors; the 2005 Indiana State Bar Association's Women in the Law Recognition Award; and the 2006 Tippecanoe County YMCA Salute to Women "Women of Distinction" Award.

Judge Robb, who was retained on the Court of Appeals by election in 2000, lives in West Lafayette with her husband, a Professor of Communication at Purdue. Their son, Douglas, a graduate of the U.S. N.A., recently embarked on his first deployment.

ATTORNEYS FOR THE PARTIES

For Appellant, Lake County Board of Zoning Appeals et al.

George C. Patrick

George C. Patrick & Associates P.C.

Crown Point

George Patrick, the senior partner at George C. Patrick & Associates, established in 1999, has broad experience in trial and appellate matters involving worker's compensation, local government, civil rights, equine law, real estate development, and zoning.

Mr. Patrick grew up in Tippecanoe County and graduated from McCutcheon High School. He received his undergraduate degree from Northwestern University in 1989 and his law degree in 1992 from Valparaiso University School of Law.

Mr. Patrick is admitted to practice before Supreme Court of the United States of America, the Indiana Supreme Court, the Worker's Compensation Board of Indiana, the U.S. Court of Appeals for the Seventh Circuit Court, and the federal courts in the State of Indiana. The Workplace Litigation Group elected Mr. Patrick to serve on its Board of Directors in 1999. He assists and works on Worker's Compensation legislation in the General Assembly of Indiana.

For Appellees, James C. Thorn and Pamela Thorn et al.

Kenneth D. Reed and John P. Reed

Abrahamson Reed & Bilse

Hammond

Kenneth D. Reed was born in East Chicago in 1937. He graduated from Hammond High School in 1955 and attended Drake University in Des Moines on a full football and track scholarship. Mr. Reed received his Bachelor of Science in Business from Drake in 1958 and his J.D. from the Drake University School of Law in 1961. Mr. Reed has practiced law in Hammond for more than 45 years. He is a partner in the firm of Abrahamson, Reed & Bilse, and has participated in hundreds of bench and jury trials in both the state and federal courts. Mr. Reed currently resides in Schererville with his wife of 50 years. He raised two children, Dr. Kenneth W. Reed, D.O., and John P. Reed, Esq.

John P. Reed is a native of East Chicago. He graduated from Munster High School in 1989 and from the Indiana University School of Business with a Bachelor of Science in Business in 1993. He received his J.D. in 1997 from the DePaul University School of Law in Chicago. Mr. Reed is a partner in the firm of Abrahamson, Reed & Bilse. He currently resides in Munster with his wife, Kristan, and their two daughters, Kylie (4) and Cameran (1).